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No. 563

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

W. L. D. WINSHIP ET AL.,
Appellants,

vs.

CITY OF CORPUS CHRISTI, TEXAS,
Appellee.

ON APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE THIRTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS, SITTING AT CORPUS CHRISTI, TEXAS.

APPELLEE'S MOTION TO DISMISS AND BRIEF IN SUPPORT THEREOF

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ON APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE THIRTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS, SITTING AT CORPUS CHRISTI, TEXAS.

APPELLEE'S MOTION TO DISMISS

NOW COMES City of Corpus Christi, Texas, a municipal corporation, Appellee, and pursuant to Rule 16 of the Rules of this Court, moves to dismiss the appeal in the above styled and numbered case on the following grounds:

(a) Because this appeal, not having been taken in conformity with Section 1257 (2), Title 28, U.S.C.A., the same is not within the jurisdiction of this Court.

(b) Because this appeal, not having been taken in conformity with Rule 15(d) of this Court, the same is not within the jurisdiction of this Court.

(c) Because the questions now being urged before this Court were not timely raised below.

(d) Because the questions now being urged before this Court were not properly raised below.

(e) Because this case does not present a substantial federal question.

(f) Because the Judgment in this case rests on an adequate non-Federal basis.

WHEREFORE, PREMISES CONSIDERED, Appellee prays that this appeal be in all things dismissed and that Appellee be awarded their costs, and for such other and further relief as is proper.

I. M. Singer

I. M. SINGER
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City of Corpus Christi
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Corpus Christi, Texas
Attorney for Appellee

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CITY OF CORPUS CHRISTI, TEXAS,
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ON APPEAL FROM THE COURT OF CIVIL APPEALS FOR THE THIRTEENTH SUPREME JUDICIAL DISTRICT OF TEXAS, SITTING AT CORPUS CHRSTI, TEXAS.

BRIEF IN SUPPORT OF ATTACHED, PRECEDING MOTION OF APPELLEE TO DISMISS

NOW COMES City of Corpus Christi, Texas, a municipal corporation, Appellee, and submits this Brief, pursuant to Rules 16, 35 and 39 of this Court, in support of the attached, preceding Motion to Dismiss.

STATEMENT OF THE CASE

Appellants are not quite accurate in their statement. The statement that Article 1182a, V.A.T.S., "was the law controlling the annexation of territory to the City of Corpus Christi" is a mere allegation on the part of appellants and the Texas Courts have not agreed with such allegation. Though Appellants alleged that "the City will need to acquire" water systems of the respective water districts, there are no allegations that the City must acquire or operate such water systems. The City government is an entirely different function than the utility business and there was no greater compulsion to acquire either water system than there was or is to acquire an independent gas system or independently owned electric system.

The City of Corpus Christi, Texas, is a home rule city whose Charter reserves to the qualified voters the right to decide upon all major annexations.

> "Such question of annexation of any given territory may be submitted to the qualified voters of the City at any time upon the majority vote of the members of the Council. The question of annexation of any given territory may come before the Council for consideration upon either (1) the will of the Council, or (2) the written recommendation of the Zoning and Planning Commission of the City, or (3) petition signed by not less than 1,500 qualified voters of the City, or (4) petition signed by not less than 10% of the qualified voters residing in the territory proposed to be annexed." (City Charter Article 1, Section 2(a)).

The Texas Constitution, in Article XI, Section 5* (the so-called Home Rule Amendment), confers on cities of over 5,000 inhabitants the power to adopt or amend their charters subject to such limitation as may be prescribed by the Texas Legislature. Article 1175-2* of the Revised Civil Statutes of Texas, recognizes the power of such cities to provide in their charters the rules for annexing additional territory lying adjacent to such cities.

The annexations in question were decided by the qualified voters of the Appellee City after an election was called by the City Council. The majority of such voters having voted in favor of annexation, the City Council of Appellee City followed the mandatory provisions of its Charter (Section 2(a), Article 1 of City Charter), by passing ordinances annexing such territory to the Appellee City (Ordinance No. 6242, Juris. Stmt., pp. A-24 through A-31, and Ordinance No. 6636, Juris. Stmt., pp. A-50 through A-69).

The annexation of 1961 was the subject of the appeal to the Supreme Court of the United States and the appeal denied, *Pennington et al.* v. *City of Corpus Christi et al.*, 363 S.W.2d 502 (Civ. App. writ ref., n.r.e.), ... U.S. ....., ... S. Ct. ....., 11 L. Ed. 2d 471. That was the only water district involved which had any indebtedness and therefore the only district with indebtedness which the City could assume. Therefore, the 1962 election did not involve any water district having any outstanding bonded indebtedness and Article 1182a could not possibly apply. The clearness possessed by Appellants (Juris. Stmt., p. 10) that "the City of Corpus Christi had no authority by law or Charter provision to annex", is not

*See Appendix, herein numbered page A1.

found to exist by the Court (A-5 and authorities listed there).

Appellants are including certain matters not in the Transcript and those are specifically discussed at page 7, page 10 and page 14 hereof. Appellees are compelled to deny those specific assertions on page 26 of Appellants' Jurisdictional Statement. Not in the record but in reply to Appellants' Statement, on page 26, Appellee states the facts to be as follows: Two elections have been held since the opinion was rendered by the Texas Court of Civil Appeals in this case. The Nueces County Water Control and Improvement District No. 2 (Flour Bluff Water District) voted in favor of merging the water district with the City and the property taxpaying voters in the City voted in favor of assuming the water district indebtedness and taking over the property and operation of the district facilities. This taking over of the District by Appellee renders moot the question of Article 1182a, V.A.T.S. The other water district (Nueces County Fresh Water Supply District No. 1) is still in control of all its property, still purchasing treated water from the City and still operating all of its facilities and distributing water to all of its customers just as before the election.

1. **Appellants Have Failed to Comply with Section 1257 (2) of Title 28, U.S.C.A., or with Rule 15(d) of This Court and Have Neither Timely nor Properly Raised Any Constitutional Questions in the Courts Below.** (Germane to Grounds for Dismissal A, B, C and D).

Appellants attempt to raise four questions:

(1) Lack of authority of the City to annex a part of a water district where Charter is silent as to water district but does contain general provisions as to annexation.

(2) Annexation of a part of the area covered by a water district automatically takes the property of the water district and therefore takes property without compensation in violation of the U. S. Constitution.

(3) Annexation by vote of the City annexing and not including a vote of the voters in the area annexed is violation of due process clause. Assumes that voting on annexation by the voters in the annexed area is a fundamental right (p. 19).

(4) The exclusion from annexation of certain territory is a benefit to that territory and therefore unlawful discrimination in placing burdens on the area annexed.

Questions (1), (2) and (3) are grouped as one question as presented by Appellants.

The principal reasons urged for Appellants were all presented to the trial and appellate Courts of Texas and rejected by said Courts. The proceedings in the Supreme Court of Texas are not mentioned in request for transcript of Appellants contained in Appellants' "Notice of Appeal to the Supreme Court of the United States", and Appellee does not waive such omission. The Court of Civil Appeals does not by statute have final jurisdiction in this action and Appellants have not shown by the transcript that the questions presented have been raised in the State Court of final jurisdiction. Whether or not the copies of the Application for Writ of Error to the Supreme Court of Texas and to which Appellants refer on pages 2 and 11 of Appellants' Jurisdictional Statement are correct is not known by Appellee as said proceedings are not in the transcript and no copy of said copy of Application for Writ of Error or Motion for Rehearing have been furnished to Appellee.

Article 1182a Does Not Apply.

Appellants make allegations at random regarding the fact that in the two annexation proceedings, parts of the area covered by each of two water districts distributing water to household consumers was annexed. The districts are really public utility water distribution systems who purchase treated water from the City of Corpus Christi and distribute it through a pipe system owned by the respective district. Appellants erroneously have concluded that simply by annexing part of the area served by each of said districts the City automatically takes over the respective water distribution systems. Of course, such is not an automatic result of annexation any more than if the districts were private corporations, such as gas distribution systems, electricity supply systems or telephone service systems. Appellants have urged on the Trial Court that Article 1182a, V.A.T.S. (Juris. Stmt., pp. A-9 to A-12) must apply; whereas, by its own terms, said Article only applies where the City *intends* to merge the facilities of the water distribution system with the City system *and assume the bonded indebtedness* of the district *by a vote of property taxpaying voters at the same time as the annexation question* is submitted. The City of Corpus Christi did not intend such a merger of systems and assumption of debt and so did not submit the annexation question to taxpaying voters. Therefore, Article 1182a, V.A.T.S., had no application to the annexation proceedings and the plain, simple procedure set forth in the City Charter was followed. Since no assumption of indebtedness was under consideration at the time of the annexation election, there was no statutory or constitutional requirement to limit the voters to those who were property taxpayers. The State Courts have, therefore, held that there was a full compliance with the terms of the City

Charter and no need to comply with the special terms of Article 1182a, V.A.T.S. Article 1182a is not a grant of power to the City, as Appellants argue (Juris. Stmt. p. 25), but is a limitation, under certain circumstances, on the general power which home rule cities have to fix their own boundaries. There is therefore no lack of power in the home rule city to annex a portion of a water district. Then, since the State Courts have held that the limitation on procedure of annexation which is set out in Article 1182a, V.A.T.S., does not apply in this instance, there is no lack of due process. Water districts may include part of a city even at time of organization. *City of Pelley* v. *Harris County Water Control & Imp. Dist. No. 7*, 145 Tex. 443, 198 S.W.2d 784. Appellants fail to comment on Article 1182c-1, V.A.T.S., cited by the Texas Court of Civil Appeals (p. A-5) which fully covers situations of annexation by a city of a portion of an existing water district. The case of *Jefferson County Water Control and Improvement District No. 5* v. *City of Port Arthur*, 160 Tex. 136, 327 S.W.2d 415 (1959), is cited in the opinion of the Court of Civil Appeals and that case expressly holds that there is no automatic taking over of the property or operations of a water district upon annexation of a part thereof by a city. Such holding dispels the erroneous assumption made by Appellants as a premise upon which to base this appeal. (Juris. Stmt. p. 26)

Appellants Fail to State a Case under Section 1257(2) of Title 28, U.S.C.A., or with Rule 15(d) of the Supreme Court.

As stated at the outset, this case is really an attempt to avoid the effect of two annexation ordinances which were adopted by the City after following the provisions of its Charter by holding election at which elections the

qualified voters of the City favored annexation. The 1961 election has already been litigated by appeal to the Supreme Court and appeal dismissed, *Pennington et al.* v. *City of Corpus Christi et al.*, 363 S.W.2d 502 (Civ. App., writ ref., n.r.e.), ... U.S. ....., ... S. Ct. ....., 11 L. Ed. 2d 471. The premise to the argument urged by Appellants as to why the 1962 annexation was unconstitutional is shown by the pleading of Appellants to be faulty. There is no allegation that the City *must* take over either water district and no allegation that the only water district affected by the 1962 election (District No. 1) had any indebtedness which the City could assume. There is therefore no question of constitutionality of any statute, law or ordinance. There is merely an attempt to show noncompliance with State Statutes which have no application.

The Questions Attempted to Be Raised by Appellants Are Not Shown by the Record to Be Timely or Properly Raised.

The Court of Civil Appeals in this case had great difficulty in determining what points Appellants were urging and only after indulging in careful examination of the statements and arguments could any semblance of legal point be separated from the many general statements and legal conclusions of Appellants (Appellants' Juris. Stmt. p. A-2). That Court then concluded there was no merit in the points. The Transcript does not contain the Application for Writ of Error to the Supreme Court nor the Motion for Rehearing after denial of such Application though the order overruling both Application and Motion do appear in the Appendix to the Appellants' Jurisdictional Statement (pp. A. 74-75). The Appellants therefore cannot comply with the terms of Rule 15d by giving specific reference to the place in the record where the constitutional questions, if any, appear.

II. Appellants Raise No Constitutional Questions.

(Germane to Ground for Dismissal E).

The only questions presented by Appellants concern (1) failure of the City to follow, in annexing certain areas, procedures urged by Appellants as being mandatory, and (2) failure to annex more territory than was covered by the annexation procedures. As to the procedures applicable, the Opinion of the Court of Civil Appeals finds that the procedures followed were proper and adequate and that no constitutional violation existed. As to the question of omission to annex other territory, it is apparent that Appellants base their complaint on the false assumption that exclusion of an area is a benefit to the owners. See *Kelly* v. *Pittsburgh*, 104 U.S. 658, *Hunter* v. *Pittsburgh*, 207 U.S. 161, *Pan American* v. *Texas City*, 157 Tex. 450, appeal dismissed 355 U.S. 603 (1958), where the courts hold as a matter of law that inclusion of any area within an incorporated city is a benefit to that area.

III. Judgment in This Case Rests on an Adequate Non-Federal Basis. (Germane to Ground for Dismissal F).

This is not in reality a suit raising a question of constitutional law. The questions raised are all collateral attacks, only, upon annexation proceedings and the incidental results to these particular persons and/or their property. The only tax questions involved are alleged errors in administration of the tax laws and not attacks upon the laws as such. The tax law administration questions could all be remedied, if established, by actions in the State Courts and are not matters over which the Federal Courts have any jurisdiction. *Norton* v. *Cass County*, 5th Cir., 115 F.2d 884, and *Orange, Texas*, v. *Levingston Shipbuilding Co.*, 5th Cir. (1958), 258 F.2d 240, 28 U.S.C.A. 1341. The annexation

questions are not sufficient to invoke the attention of the Court unless the action of the City was wholly without any authority. The State Courts have fully, finally and completely adjudicated the validity of the annexation proceedings and held the annexations valid. This is not a direct attack by quo warranto proceedings as was the *Pan American* v. *Texas City* case (303 S.W.2d 780). Even in that case the annexation was held valid in an action where much more serious allegations were made attacking validity than are made in this case. The Appellants do not negative any right to remedy in the State Courts from alleged tax inequities. They merely allege their own conclusions of imagined injustices. There is no denial of the power of the City to enlarge its boundaries. There is only the complaint as to the motives of the Council and the failure to annex additional area. These were not sufficient grounds to make a collateral attack on the annexation proceedings. These recognize the power in the City to annex. The effect of the exercise of that power is the only thing about which complaint is made. This is not a constitutional question. As far back as 1881 the Supreme Court of the United States said,

> "What portion of a State shall be within the limits of a city and governed by its authorities and its laws has always been considered to be a proper subject of legislation." *Kelly* v. *Pittsburgh*, 104 U.S. 658 at 659.

This rule has continued to be followed. *Hunter* v. *Pittsburgh*, 207 U.S. 161 and *State ex rel. Pan American* v. *Texas City*, 157 Tex. 450, appeal dismissed 355 U.S. 603 (1958); 62 C.J.S. p. 122.

If this Court is going to concern itself with the same problem that the State Courts have been concerned with, we shall consider the angle from which the Appellants seek to raise constitutional questions out of the incident of

exercise of a power exclusively vested in the State, to-wit, annexation. There is no question raised as to the existence of the power of annexation being in this home rule city. The only question is as to whether or not the City acted within the procedure provided by its Charter and by the State Law. This is a collateral attack. This is not a matter for concern of any courts in any action other than a Quo Warranto proceeding. If the annexation proceedings were void then, and only then, could the collateral attack be urged. These annexation proceedings of 1961 and 1962 have not only been apparently valid, but the courts of the State (in six instances) have declared them valid. They cannot, therefore, be void. Being valid annexations according to State-approved procedure, there is a sound non-Federal basis for the judgment.

In all of the rambling of Appellants herein, they fail to even allude to the case of *Pennington et al.* v. *City of Corpus Christi et al.*, 363 S.W.2d 502 (Civ. App. writ. ref., n.r.e.), U.S. ....., ... S. Ct. ....., 11 L. Ed. 2d 471. The annexation of 1961 has been upheld by the State courts and the U. S. Supreme Court. Appellants are precluded from attacking said annexation in that all points litigated or that could have been litigated in that case are now *res judicata*. That was a class action for the benefit of that segment of the public residing in and/or owning property in the area annexed in 1961 and all of said residents and property owners are bound thereby, 34 Tex. Jur. 2d p. 475, *Palestine* v. *Houston*, (Civ. App.) 262 S.W. 215, error dismissed, contrary to Appellants' statement on page 26 that the "Water Districts remain active in the non-annexed areas thereof", there have been two elections in 1964 concerning the Nueces County District No. 2: an election by the qualified taxpaying voters of the City of Corpus Christi and an election by the voters of the water district. Both

elections carried in favor of the City's taking over the assets and liabilities of the district. A contract has been entered into and the District is now operated by Appellee City.

We submit that Appellants herein have intentionally not informed this Honorable Court of the *Pennington* case nor of the elections of this year. The elections render moot the water district problem posed by Appellants. The *Pennington* decision is *res judicata* on those points anyway.

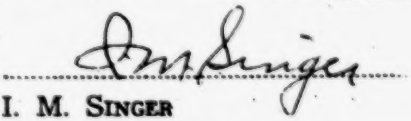
The Appellants' statement on page 26 that the Nueces County District No. 2 is still active is an outright fabrication, well known to Appellants. Appellants were active in an attempt to defeat the said elections of the City and the District. The Appellant Mr. Winship even has written letters to and published in the newspapers urging defeat of the proposals. Thus the fear that the Appellants say they have as to taking the property of the districts by the city cannot really exist. District No. 1 is still operating as it was before annexation. District No. 2 has after election both in the district and in the city merged with the city and the city under contract with the district operates all the facilities of the district, all as set out on page 6 hereof.

The Appellees further charge that neither of the water districts were really concerned with the effects of annexation which appellants have so extensively litigated. Said districts, were, at the instance of Appellees, made parties to this proceeding but have taken no active part. The group of citizens represented by the same attorney who represented the Appellants *Pennington et al.* in that proceeding have attempted to postpone taxation and other incidents of annexations personal to them by extensive

and extended litigation. They have been frustrated and are legally barred by the adverse judgment in the *Pennington* case but seek to keep one or more actions collaterally attacking the annexation proceedings pending in some Court to delay the day as long as possible when the people annexing and the people annexed can work together on local municipal problems. The fact that a third case involving said annexations has been filed in the Federal District Court and is on appeal at this time under the guidance of the same attorney as this case and having W. L. D. Winship as surety on the appeal bond is further evidence of intent to litigate the annexations as long as possible. A dismissal of this frivolous appeal is urged by Appellees to end this branch of the annexation litigation.

PREMISES CONSIDERED, for each of the grounds for dismissal hereinabove set forth, it is respectfully submitted that the appeal should be dismissed.

Respectfully submitted,



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SERVICE OF PROCESS

I, I. M. SINGER, a member of the Bar of the Supreme Court of the United States, representing the Appellee herein, do hereby certify that this Motion to dismiss has been served upon Appellants by depositing copies thereof in the United States mail in Corpus Christi, Texas, with first-class postage prepaid, counsel of record for Appellants, this 3 day of November, 1964.

I. M. Singer

I. M. SINGER

APPENDIX

APPENDIX

Article 1175, Section 2, Vernon's Annotated Texas Statutes: Enumerated Powers.

Cities adopting the charter or amendment hereunder shall have full power of local self-government, and among the other powers that may be exercised by any such city the following are hereby enumerated for greater certainty:

2. The power to fix the boundary limits of said city, to provide for the extension of said boundary limits and the annexation of additional territory lying adjacent to said city, to provide for the disannexation of territory within such city and to provide for the exchange of territory with other cities or towns, according to such rules as may be provided by said charter not inconsistent with the procedural rules prescribed by the Municipal Annexation Act.

Article XI, Section 5, Texas Constitution.

Sec. 5. Cities having more than five thousand (5000) inhabitants may, by a majority vote of the qualified voters of said city, at an election held for that purpose, adopt or amend their charters, subject to such limitations as may be prescribed by the Legislature, and providing that no charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State; said cities may levy, assess and collect such taxes as may be authorized by law or by their charters; but no tax for any purpose shall ever be lawful for any one year, which shall exceed two and one-half

per cent of the taxable property of such city, and no debt shall ever be created by any city, unless at the same time provision be made to assess and collect annually a sufficient sum to pay the interest thereon and creating a sinking fund of at least two per cent thereon; and provided further, that no city charter shall be altered, amended or repealed oftener than every two years.